

FCC Enforcement Monitor August 2021

By Scott R. Flick and Elizabeth E. Craig

HEADLINES

Pillsbury's communications lawyers have published FCC Enforcement Monitor monthly since 1999 to inform our clients of notable FCC enforcement actions against FCC license holders and others. This month's issue includes:

- *Broadcasters Fined for Late-Filed Issues/Programs Lists*
- *Cable Sports Network Receives Proposed Fine of \$20,000 for EAS Violation*
- *FCC Enters Consent Decrees with Wireless Providers for Engaging in Prohibited Communications During Spectrum Auction*

FCC Proposes Stiff Fines for Two TV Stations With Late-Filed Issues/Programs Lists

The FCC fined a Louisiana and a Georgia television station for failing to timely upload quarterly Issues/Programs Lists to their Public Inspection Files. Both stations recently applied for renewal of their licenses, and an FCC staff review of the stations' Public Inspection Files revealed that one station uploaded 16 Lists late and the other uploaded 21 Lists late.

Section 73.3526(e)(11)(i) of the FCC's Rules requires every commercial television licensee to place in its online Public Inspection File "a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period." The list must include a brief narrative of the issues addressed, as well as the date, time, duration, and title of each program addressing those issues. The list must be placed in the online Public Inspection File on a quarterly basis within ten days of the end of each calendar quarter.

In addition to the lists having been filed late, the FCC noted that most of the lists were actually filed over a year late. The Commission therefore concluded that each broadcaster had willfully and repeatedly violated Section 73.3526 of the FCC's Rules. Section 312(f)(1) of the Communications Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law, and "repeated" as applying where an act occurs more than once or, if an act is continuous, for more than one day. Though each broadcaster indicated that the Lists were uploaded late due to station staffing issues or their staff's lack of familiarity with the Public File rule, the FCC noted that employee acts such as clerical errors in failing to file required forms do not excuse a violation.

In determining the amount of a proposed fine, the FCC may adjust its base fine amount for such a violation upward or downward based upon the nature, circumstances, extent, and gravity of the violation, in addition to the licensee's degree of culpability and any history of prior offenses. Section 1.80(b)(10) of the Commission's rules establishes a base fine of \$10,000 for Public Inspection File violations.

In both instances, the FCC determined that the amount should be adjusted upward due to the large number of late-filed lists. The broadcaster that filed 16 Lists late faces a \$15,000 proposed fine, while the broadcaster that filed 21 Lists late faces a \$20,000 fine. However, in neither case did the FCC find that the violation would constitute a "serious violation" or pattern of abuse preventing renewal of the stations' licenses. Barring other issues arising, the FCC indicated that both license renewal applications would be granted in separate Commission actions upon conclusion of the stations' respective forfeiture proceedings.

FCC Proposes \$20,000 Fine Against Cable Sports Network for Violating EAS Rule

The FCC issued a Notice of Apparent Liability for Forfeiture (NAL) to a cable sports network for violating the Commission's Emergency Alert System (EAS) rules. Specifically, Section 11.45 of the Commission's Rules prohibits the transmission of false or deceptive EAS tones.

The EAS is a nationwide public warning system designed to alert the public in case of emergencies, such as severe weather warnings or AMBER alerts. In order to maintain the effectiveness of such emergency alerts, EAS tones may only be aired for specific uses, such as actual emergencies, authorized tests, and qualified public service announcements (PSAs). Section 11.45 strictly prohibits airing the EAS tones, or simulations thereof, except in connection with one of those permitted uses.

In October 2020, the FCC became aware that a cable network had transmitted during a program EAS tones that were not connected to an emergency, authorized test, or qualified PSA. The Commission's Enforcement Bureau sent a Letter of Inquiry to the network seeking information regarding the inclusion of EAS tones in the program. The network responded, admitting that it aired the tones in the context of a television show depicting a weather event. While there was no actual emergency occurring at the time, the network noted that the show featured a dramatic retelling of an actual weather event. The network also explained that the tones lasted less than two seconds and did not include keying tones, so they could not have triggered any automated EAS relay equipment.

Rejecting this explanation, the FCC found that the network willfully violated Section 11.45 of the Commission's Rules, stating that whether the EAS rule was violated does not turn on the length of time the tones were aired, nor whether EAS data was embedded within the tones. The FCC also noted that while it has issued its base fine of \$8,000 for past violations of the EAS rule, it may upwardly adjust the fine for violations that are particularly egregious, intentional, repeated, cause substantial harm, or generate substantial economic gain for the violator.

In this instance, the FCC noted the seriousness of the matter given the potential to undermine the integrity of the EAS system when the tones are used outside of true emergencies or tests. The Commission also considered other factors, such as the number of times the false EAS tone was transmitted, the length of time over which the violations occurred, the audience reach (nationwide), and the extent of the public safety impact. Finally, the FCC noted that the network had previously been fined for violating the same rule.

Given the nationwide scope of the audience, the serious public safety implications, and the prior history of EAS violations, the FCC concluded that an upward adjustment was warranted, proposing a total fine of \$20,000. The company has 30 days from release of the NAL to pay the fine or file a written statement seeking reduction or cancellation of the proposed fine.

FCC Fines Wireless Providers for Violating Rules Against Communicating Bidding Strategies During FCC Spectrum Auction

Two Internet service providers recently agreed to enter into consent decrees with the FCC for engaging in prohibited communications regarding their bids and bidding strategies with other FCC Auction 105 participants.

Section 1.2105(c)(1) of the Commission's Rules forbids FCC auction applicants from conveying certain information to other auction applicants during the "quiet period." This "quiet period" begins on the deadline for filing a short-form application to participate in the auction and ends on the deadline for winning bidders to submit downpayments. The rule applies to any communication by an applicant regarding its own, or any other applicant's, bids or bidding strategies.

While an applicant may state that it has applied to participate in a spectrum auction, a public statement by a party that it does not intend to place bids (or that it intends to stop bidding) can violate Section 1.2105(c)(1).

Additionally, Section 1.2105(c)(4) requires applicants to disclose to the FCC if it makes or receives a communication that appears to violate section 1.2105(c). Applicants must disclose potential violations in writing to the Commission immediately, and no later than five business days after the communication occurred.

In one case, a company official expressed to a Wireless Internet Service Providers Association members email group his company's intent to cease participating in the auction. This email group included other auction participants, at least one of whom timely reported the communication to the FCC as required by Section 1.2105(c)(4). The company itself self-reported the disclosure, and ultimately elected to enter into a consent decree with the FCC to resolve the matter. While the consent decree did not include an admission of guilt, the company did agree to institute a training and compliance program, file annual compliance reports with the FCC for the next three years, and pay a civil penalty of \$30,000.

In a separate matter, an officer of another potential bidder posted a statement to a Facebook group saying that the company did not intend to place any bids in the auction. Another auction participant saw and timely reported the communication to the FCC, but in this case, the potential bidder that posted the message did not self-report the communication to the FCC.

When the FCC commenced an investigation, the potential bidder elected to enter into a consent decree with the Commission to conclude the matter. In this case, however, the consent decree included an admission that the party violated Section 1.2105(c)(4) by not reporting the prohibited communication. Along with committing to a training and compliance program, and submitting annual compliance reports to the FCC for the next three years, the potential bidder agreed to pay a civil penalty of \$50,000 to conclude the investigation.